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No. 89-213

In the Supreme Court of the United States

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA, PETITIONER

v.

INOCENCIO MUNIZ

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, MIDDLE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a videotape of respondent being booked, taking certain sobriety tests, and refusing to take a breath test was properly admitted, even though respondent had not been advised of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

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INTEREST OF THE UNITED STATES

The United States has an interest in this case because the question whether particular evidence is testimonial arises frequently in federal criminal prosecutions. In addition, the federal government has an interest in sobriety testing and videotaping drunk driving suspects. The National Highway Traffic Safety Administration, part of the Department of Transportation, has distributed manuals advising local police departments on the conduct of field sobriety tests. With the Department's approval, many local police departments have used federal funds provided under 23 U.S.C. 402 (1982 & Supp. V 1987) to purchase equipment for videotaping sobriety tests. Finally, the decision in this case will have a direct impact on federal law enforcement efforts,

as it will determine whether officers who make drunk driving arrests on federal property may videotape subjects taking sobriety tests in order to secure reliable and graphic evidence of the subjects' condition at the time of arrest.

STATEMENT

1. At 2:50 a.m. on November 30, 1986, a police officer on patrol in Cumberland County, Pennsylvania, saw a car stopped on the side of the road with its hazard lights flashing. Respondent was sitting in the driver's seat, and a passenger was sitting beside him. The officer stopped and asked if he could be of assistance, but respondent said that he had just stopped to urinate. The officer smelled alcohol on respondent's breath and warned him to sober up before driving. Respondent said that he would stay on the side of the road until he could drive safely. As the officer was returning to his patrol car, however, respondent drove away. Pet. App. B1-B3, C3-C4.

The officer followed respondent and pulled him over after respondent had driven about half a mile. When respondent had difficulty producing his driver's license, the officer administered three sobriety tests on the side of the road—the horizontal gaze nystagmus test, the "walk and turn" test, and the "one leg stand" test.[1] Respondent failed each of

[1] The National Highway Traffic Safety Administration (NHTSA) recommends the administration of these three tests. See U.S. Dep't of Transp., *Improved Sobriety Testing*, US DOT-NHTSA HS-0806512 (Aug. 1989), *reprinted in* 1 R. Erwin, M. Minzer, L. Greeberg & H. Goldstein, *Defense of Drunk Driving Cases* § 8A.99, at 8A-42 to 8A-51 (3d ed. 1989). As the NHTSA manual explains, the horizontal gaze nystagmus test measures "the jerking of the eyes as they gaze to the side." *Id.* at 8A-43. Everyone exhibits some jerking of the eyes upon looking to the side, but in the case of intoxicated persons "the onset of the jerking occurs after fewer degrees of turning, and the jerking at more extreme angles becomes more distinct." *Id.* at 8A-43, 8A-45. The "walk and turn" test requires the subject to walk heel-to-toe along a straight line for nine paces, turn, and walk heel-to-toe along the line again for nine paces. *Id.* at 8A-46. The "one leg stand" test requires the subject to stand on one leg for 30 seconds. *Id.* at 8A-48. As would be expected, persons who are intoxicated often have difficulty performing the walk and turn and one leg stand tests.

the tests. He told the officer that he could not perform the various tasks because he was too inebriated. Pet. App. B3-B4.

The officer then took respondent to the Cumberland County Central Booking Center. In accordance with its standard procedure in drunk driving cases, the Booking Center videotaped the proceedings there. An officer at the Booking Center first asked respondent his name, address, height, weight, eye color, date of birth, and current age. The officer then asked respondent the date of his sixth birthday. When respondent was unable to calculate that date, the officer administered the same three sobriety tests that respondent had performed on the side of the road. Pet. App. B15-B16. While performing the tests, respondent "attempted to explain his difficulties in performing the various tasks, and often requested further clarification of the tasks he was to perform." *Id.* at B16. An employee at the Booking Center then explained Pennsylvania's Implied Consent Law to respondent and sought to check his blood alcohol level by a breath test.[2] After asking a number of questions about the Pennsylvania law, respondent refused to take the breath test. He was then advised of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Pet. App. B15-B16, C6.

2. The videotape showing the booking, the administration of the sobriety tests, and petitioner's refusal to take the breath test was admitted into evidence at respondent's bench trial. Testimony relating to the sobriety tests ad-

[2] Under that law, 75 Pa. Cons. Stat. Ann. § 1547 (Purdon 1977), individuals driving on Pennsylvania roads are deemed to have consented to have their blood alcohol level checked.

ministered on the side of the road was aiso admitted. Pet. App. C5-C6. Respondent was convicted of driving under the influence of alcohol. As a repeat offender, he was sentenced to imprisonment for not less than 45 days nor more than 23 months. Pet. App. D2.

Respondent filed a motion for a new trial, arguing that the court should have excluded the testimony relating to the field sobriety tests and the videotape taken at the Booking Center, "because they were incriminating and completed prior to [respondent's] receiving his Miranda warnings." Pet. App. C5-C6. The trial court denied the motion. It explained that "requesting a driver, suspected of driving under the influence of alcohol, to perform physical tests or take a breath analysis does not violate [his] privilege against self-incrimination because [the] evidence procured is of a physical nature rather than testimonial, and therefore no Miranda warnings are required." *Ibid.* (quoting *Commonwealth* v. *Benson*, 280 Pa. Super. 20, 29, 421 A.2d 383, 387 (1980) (brackets in original)). The court added: "This would likewise hold true for the videotape of the defendant taken at the booking center, particularly where, as here, the defendant gave no incriminating statement; rather it was the defendant's actions that were incriminating." Pet. App. C6.

3. The Superior Court reversed by a 2-1 vote. Pet. App. B1-B20. At the outset, the court agreed with the trial court that, under *Schmerber* v. *California*, 384 U.S. 757 (1966), sobriety tests elicit physical evidence rather than testimonial evidence, so that the Fifth Amendment does not bar the government from compelling suspects to take such tests. Accordingly, the court held that when respondent was asked "to submit to a field sobriety test, and later perform these tests before the videotape camera, no *Miranda* warnings were required." Pet. App. B9-B10. The court concluded, however, that "when the physical nature of the tests begins to yield testimonial and communicative statements • • •

the protections afforded by *Miranda* are invoked." *Id.* at B10.

The Superior Court held that during the booking process respondent "was subjected to questioning that elicited information revealing his thought processes." Pet. App. B15. In addition, the court held that "the questions posited by [respondent] during his on-camera physical sobriety tests" constituted testimonial evidence that should not have been admitted at trial. *Id.* at B17. The court further held that respondent's statements, including his responses to the booking questions, his comments while taking the sobriety tests, and his questions about the Pennsylvania implied consent law, "were clearly compelled by the questions and instructions presented to him during his detention at the Booking Center." *Ibid.* Finally, the court held that respondent's videotaped responses "were clearly prejudicial, and certainly led the finder of fact to infer that his confusion and failure to speak clearly indicated a state of drunkenness that prohibited him from safely operating his vehicle." *Id.* at B17-B18. The court therefore concluded that respondent must be granted a new trial.

The dissenting judge concluded that most of the disputed evidence was not testimonial and therefore did not have to be excluded at trial. According to the dissenting judge, "the only inadmissible evidence was the police officer's request that [respondent] calculate the date of his sixth birthday." In light of the other evidence of respondent's guilt, the dissenting judge would have found the "sixth birthday" evidence insufficiently prejudicial to require reversal of the conviction. Pet. App. B20.

The Pennsylvania Supreme Court denied the Commonwealth's application for review. Pet. App. A1-A2.

SUMMARY OF ARGUMENT

The videotape of respondent's activities at the Booking Center was admissible because it was not the product of custodial interrogation. Much of what respondent said and did at the Booking Center was not in response to questioning at all. Moreover, his statements and actions were admitted for the purpose of showing his condition at the time, not to exploit any admissions concerning his crime. There is no question that police officers could testify, based on observations made during the booking process, that the defendant was confused and that his speech in response to routine processing questions was slurred. Since a videotape merely provides better evidence for the trier of fact to determine whether the defendant's manner of functioning indicates that he was drunk, there is no reason to withhold it from the trier of fact.

1. Statements made by criminal suspects during custodial interrogation may not be introduced unless the suspects have been advised of and have waived their right to remain silent and their right to the presence of counsel at the interrogation. *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966). That principle, however, does not bar the police from asking routine processing questions while booking a suspect and using the suspect's answers against him if the answers turn out to be incriminating. The booking process is far removed from the kind of custodial interrogation that the Court was concerned with in *Miranda*. Booking is an administrative process, not part of the investigation of crime. It is essential for the police to obtain basic identification information about the suspect they are taking into custody. Booking is not designed to elicit incriminating admissions, and it is normally brief and non-coercive in nature. Because none of the concerns that underlay the Court's decision in *Miranda* are presented in the booking process, the exclu-

sionary rule of *Miranda* should not be extended to that setting.

2. The question about the date of respondent's sixth birthday was asked during booking, but it was not a routine booking question. Instead, it was a sobriety test. The purpose of the question was not to elicit information or an admission, but to determine whether respondent could perform a simple arithmetic calculation. Because the question was not designed to elicit a testimonial response, it did not constitute custodial interrogation within the meaning of *Miranda*. For that reason, the trial court properly admitted the portion of the videotape showing that respondent was unable to calculate the date of his sixth birthday.

3. The Fifth Amendment does not prohibit the police from compelling suspects to produce demonstrative evidence, such as a blood sample or a voice exemplar. Accordingly, the police did not err by administering the sobriety tests at the Booking Center and asking respondent to take the breath test without advising him of his right to remain silent and his right to counsel, and obtaining a waiver of those rights. Indeed, the court below acknowledged that no *Miranda* warnings were required before the police sought to determine whether respondent's performance was impaired. Pet. App. B10.

4. The same analysis applies to the statements respondent made while taking the sobriety tests and refusing to take the breath test. The fact that the audio portion of the videotape contains statements made by respondent does not make the evidence testimonial. This Court has held that a defendant may be compelled to utter the words a robber spoke and produce a voice exemplar. *United States* v. *Wade*, 388 U.S. 218 (1967); *United States* v. *Dionisio*, 410 U.S. 1 (1973). Those statements were demonstrative evidence rather than testimonial evidence: they were not admitted to prove the truth of any assertion that they contained, but

simply to show from the way the statements were made that respondent appeared to be drunk. It does not matter that, in addition to showing respondent's manner of speaking, the questions he asked indicated that he was confused. Although his confusion helped communicate the fact that he was drunk, so did the blood alcohol test that was upheld in *Schmerber* v. *California, supra*. What matters is that respondent was not asked to "speak his guilt." *Wade*, 388 U.S. at 223.

ARGUMENT

THE VIDEOTAPE OF RESPONDENT'S CONDUCT AT THE BOOKING CENTER, INCLUDING THE AUDIO PORTION, WAS PROPERLY ADMITTED INTO EVIDENCE

The Self-Incrimination Clause of the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." In *Schmerber* v. *California*, 384 U.S. 757 (1966), this Court held that a person suspected of drunk driving was not compelled to be a witness against himself when he was required to submit to a blood alcohol test and the results of that test were introduced at trial. The Court explained that the privilege against compelled self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Id.* at 761. Compulsion that makes a suspect the source of "real or physical evidence" does not violate the Fifth Amendment, the Court noted. *Id.* at 764. Because a blood test does not require the suspect to make any testimonial admission, the Court held that the result of a blood test constitutes demonstrative evidence rather than testimonial evidence and is therefore admissible even if the blood test was conducted without the suspect's consent. *Id.* at 765.

In *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966), the Court held that "the prosecution may not use statements

* * * stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." The Court subsequently defined "interrogation" to mean "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980).

The decisions in *Schmerber* and *Miranda* have guided the lower courts in resolving questions arising from the videotaping of drunk driving suspects, which has become a common practice in recent years.[3] Videotapes permit the trier of fact to see and hear the best evidence relating to the crucial fact at issue in a drunk driving case: whether the defendant was impaired by alcohol at the time of his arrest. Note, *Self-Incrimination Issues in the Context of Videotaping Drunk Drivers: Focusing on the Fifth Amendment*, 10 Harv. J.L. & Pub. Pol'y 631, 632 (1987). While it is ordinarily the prosecutor who seeks to use the videotape,[4] that is not always the case. According to

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[3] "Federal grants to local police agencies under the Safe Streets Act have enabled many local police departments to purchase videotape equipment." 1 R. Erwin, M. Minzer, L. Greeberg & H. Goldstein, *Defense of Drunk Driving Cases* § 9.02, at 9-3 (3d ed. 1989). Booking facilities that videotape drunk driving suspects "usually include a room designated for that purpose with appropriate white lines drawn both on the floor and vertically on the walls so that the balance, sway, etc. of the suspect can readily be observed." *Ibid.*

[4] In many cases, videotape evidence convinces defendants to plead guilty. One town found that over a 12-month period 56 out of 57 defendants "decided to plead guilty to the charge rather than face their movie debut in court." Foote, *supra*, 10 Harv. J.L. & Pub. Pol'y at 637. Such evidence may also have a rehabilitative value, as some drivers see, "perhaps for the first time, how they actually look and function while

some defense attorneys, a defendant "will often find that a tape recording is advantageous to his case, rather than detrimental." 1 R. Erwin, M. Minzer, L. Greenberg & H. Goldstein, *Defense of Drunk Driving Cases* § 9.02, at 9-5 (3d ed. 1989). Those attorneys contend that police officers who testify at trial tend to exaggerate the degree of a defendant's impairment, and that a videotape will often show, for example, that the defendant's speech was not thick or slurred. *Ibid.*

A recent review of cases involving challenges to the admissibility of videotapes of drunk driving suspects concluded that "[a]ll [of] the states that have addressed the question since *Schmerber* • • • now appear to agree: The *visual* component of drunk driving tapes, at least, is *not* testimonial and hence does not violate the defendant's privilege against self-incrimination." Note, *supra*, 10 Harv. J.L. & Pub. Pol'y at 645-646; see, *e.g.*, *Delgado* v. *State*, 691 S.W.2d 722, 723 (Tex. Crim. App. 1985); *State* v. *Roadifer*, 346 N.W.2d 438, 440-441 (S.D. 1984); *Palmer* v. *State*, 604 P.2d 1106, 1109 (Alaska 1979). Some state courts, however, have suppressed the audio portion of videotapes, at least in part. In *Roadifer*, for example, the court held that the audio portion of a tape could be played to show the *manner* of a defendant's speech. But the court added that any admissions the defendant might have made should be redacted from the tape. 346 N.W.2d at 441.[5]

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inebriated," rather than how they "*imagine* they handle themselves while under the influence of liquor." *Id.* at 638.

[5] See also *Thompson* v. *People*, 181 Colo. 194, 202, 510 P.2d 311, 315 (1973) ("[t]he sound on the film had been ordered suppressed by the court because it revealed that defendant invoked his Fifth Amendment right to remain silent"); *State* v. *Strickland*, 276 N.C. 253, 262, 173 S.E.2d 129, 135 (1970) ("when the sound motion picture contains incriminating statements by the defendant • • • the judge must conduct a *voir dire* to determine the admissibility of the in-custody statements").

The court that has gone the farthest in foreclosing the use of videotaped evidence in drunk driving cases is the Superior Court of Pennsylvania. See 1 R. Erwin, M. Minzer, L. Greenberg & H. Goldstein, *supra*, § 9.03, at 9-18. In prior cases, that court has suppressed the audio portion of videotapes altogether when defendants have invoked their constitutional rights, *Commonwealth* v. *Conway*, 368 Pa. Super. 488, 534 A.2d 541 (1987), allocatur denied, 520 Pa. 581, 549 A.2d 914 (1988), and it has refused to admit evidence of the suspect's inability to recite the alphabet unless the suspect was previously advised of his *Miranda* rights and validly waived those rights. *Commonwealth* v. *Bruder*, 365 Pa. Super. 106, 114, 528 A.2d 1385, 1388 (1987), allocatur denied, 518 Pa. 635, 542 A.2d 1365, rev'd, 109 S. Ct. 205 (1988). In this case, the court held that statements made by the suspect while being booked, while taking sobriety tests, and while discussing with law enforcement officials whether he would submit to a breathalyzer test could not be admitted at trial absent *Miranda* warnings and a waiver of rights under *Miranda*.

The Pennsylvania court has misapplied *Miranda* and this Court's Fifth Amendment precedents. In this case, the police did not at any point during the proceedings at the Booking Center compel respondent to be a witness against himself or violate respondent's rights under *Miranda*. Accordingly, there is no reason to suppress any portion of the videotape of those proceedings.[6]

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[6] Respondent was not in custody (nor was he compelled to make any statements) while he performed the field sobriety tests on the side of the road. See *Pennsylvania* v. *Bruder*, 109 S. Ct. 205, 207 (1988); *Berkemer* v. *McCarty*, 468 U.S. 420, 442 (1984). Since *Miranda* requires that the police advise suspects of their constitutional rights only in circumstances of custodial interrogation, the officer who stopped respondent was not required to warn respondent before questioning him and asking him to perform the sobriety tests. Therefore, the testimony relating to the results of the field tests and the statements respondent

1. *The Booking Questions*. The police did not err by booking respondent without advising him of his constitutional rights. Although booking consists of questioning that occurs while the suspect is in custody, it does not constitute "custodial interrogation" as that term was used by this Court in *Miranda*. The *Miranda* Court was concerned with police interrogation that was often intensive and lengthy, and that was designed to elicit admissions of guilt. 384 U.S. at 481. The booking process is neither coercive nor lengthy, nor is it part of the investigative effort. Instead, it is a form of administrative processing that consists mainly of obtaining information "required immediately to enable the police to book and arraign the suspect and to permit the magistrate to determine the amount of bail to be fixed and whether persons claiming to be relatives should be allowed to confer with the suspect." *United States ex rel. Hines* v. *LaVallee*, 521 F.2d 1109, 1112 (2d Cir. 1975), cert. denied, 423 U.S. 1090 (1976).

In *Rhode Island* v. *Innis*, 446 U.S. 291 (1980), the Court indicated that the police are not required to advise suspects of their *Miranda* rights before asking them routine booking questions. In that case, the Court defined "interrogation" to exclude inquiries that are "normally attendant to arrest and custody." 446 U.S. at 301. See also *South Dakota* v. *Neville*, 459 U.S. 553, 564 n.15 (1983). In the wake of *Innis*, the courts of appeals have held that *Miranda* warnings are ordinarily not required before police ask routine booking questions. See, *e.g.*, *United States* v. *Horton*, 873 F.2d 180, 181 n.2 (8th Cir. 1989) ("[i]t is well established that *Miranda* does not apply to biographical data necessary to complete booking or pretrial services"; collecting cases); *Gladden* v. *Roach*, 864 F.2d 1196, 1198 (5th Cir.)

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made while taking them, including his admission that he was too inebriated to perform the tests satisfactorily, was properly admitted into evidence.

("biographical questions, which are part of the booking routine and are not intended to elicit damaging statements, are not interrogation for Fifth Amendment purposes"), cert. denied, 109 S. Ct. 3192 (1989); *United States* v. *Gotchis*, 803 F.2d 74, 79 (2d Cir. 1986) ("[r]outine questions about a suspect's identity and marital status, ordinarily innocent of any investigative purpose, do not pose the dangers *Miranda* was designed to check"); *United States* v. *Taylor*, 799 F.2d 126, 128 (4th Cir. 1986) (officers' questions about suspect's identity not barred by *Miranda* even though suspect had already invoked his right to counsel), cert. denied, 479 U.S. 1093 (1987); *Robinson* v. *Percy*, 738 F.2d 214, 219 (7th Cir. 1984) ("*Miranda* does not apply when officers ask a suspect routine processing questions."); *United States* v. *Avery*, 717 F.2d 1020, 1024-1025 (6th Cir. 1983), cert. denied, 466 U.S. 905 (1984); *United States* v. *Glen-Archila*, 677 F.2d 809, 815-816 (11th Cir.), cert. denied, 459 U.S. 874 (1982); *United States* v. *Booth*, 669 F.2d 1231, 1238 (9th Cir. 1981); see generally 1 W. LaFave & J. Israel, *Criminal Procedure* § 6.7(b), at 504-505 (1984).

Recognizing a "booking exception" to *Miranda* does not mean, of course, that any question asked during the booking process falls within that exception. Without obtaining a waiver of the suspect's *Miranda* rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions. In this case, for example once respondent was in custody the police could not ask him whether he had been drinking, unless he waived his right to remain silent. But respondent was not subjected to custodial interrogation of the sort that must be preceded by a waiver of his *Miranda* rights when he was asked his name, address, height, weight, eye color, date of birth, and

current age. Therefore, it was not error to admit evidence of respondent's answers.[7]

2. *The "Sixth Birthday" Question.* Asking respondent to calculate the date of his sixth birthday was not a routine booking question, but neither was it a question intended to elicit a testimonial response. Instead, it was a sobriety test designed to determine if respondent could perform simple arithmetic, just as the other sobriety tests were designed to determine if he could perform simple physical functions. In that respect, the "sixth birthday" question was like asking a suspect to count to 30 or to recite the alphabet, a commonly used field sobriety test. Because the police had no investigative interest in the date on which respondent turned six, but sought only to test how respondent was functioning at the time of his arrest, the "sixth birthday" question did not constitute custodial interrogation as this Court used that term in *Miranda*.

The fact that respondent was asked to make a verbal response to the "sixth birthday" question did not make that evidence testimonial. In *United States* v. *Wade*, 388 U.S. 218 (1967), the Court held that a suspect could be compelled to speak while in a line-up. The Court explained that "compelling Wade to speak within hearing distance of the witnesses, even to utter the words purportedly uttered by the robber, was not compulsion to utter statements of a

[7] Even if the Court concludes that routine booking questions constitute custodial interrogation and are therefore governed by *Miranda*, respondent's answers to those questions are nonetheless admissible in this case. Respondent's answers to the booking questions were offered into evidence not for their contents, but simply to demonstrate respondent's condition when he was being booked. For the reasons given in more detail in point 2, *Miranda* and the Fifth Amendment do not foreclose the admission of evidence that is offered for purposes other than "for the testimonial or communicative content of what was • • • said." *United States* v. *Dionisio*, 410 U.S. 1, 7 (1973).

'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt." *Id.* at 222-223. See also *United States* v. *Dionisio*, 410 U.S. 1, 7 (1973) (rejecting the contention that the compelled production of a voice exemplar violates the Fifth Amendment); *Gilbert* v. *California*, 388 U.S. 263, 266 (1967) (compelled production of handwriting exemplar does not violate Fifth Amendment).

Like Wade, respondent was not asked to speak his guilt. The "sixth birthday" question was designed to produce a demonstration of respondent's degree of impairment, not to elicit an incriminating, testimonial response. Because the question did not call for an answer that could be incriminating due to its testimonial contents, the Fifth Amendment would not have prevented the Commonwealth from compelling respondent to respond to the question and using his failure to answer it against him at trial. See *Fisher* v. *United States*, 425 U.S. 391, 408 (1976) (Fifth Amendment "applies only when the accused is compelled to make a *testimonial* communication that is incriminating"). And because the Fifth Amendment would not prohibit the government from compelling respondent to answer the question, *Miranda*, which is designed to protect the suspect's Fifth Amendment rights, would not prohibit the government from asking that question in the course of custodial interrogation.[8]

[8] This Court's decision in *Estelle* v. *Smith*, 451 U.S. 454 (1981), provides a useful illustration of the difference between the use of verbal evidence for testimonial and demonstrative purposes. In *Smith*, the Court held that the State could not introduce evidence regarding the defendant's dangerousness where that evidence was based on a custodial psychiatric interview with the defendant that was not preceded by *Miranda* warnings. 451 U.S. at 461-469. The Court explained that the psychiatrist's testimony was inadmissible because his conclusions were not based simply on observations of the defendant, but were drawn

The Superior Court found that respondent's confused reaction to the "sixth birthday" question, like various statements he made while he was at the Booking Center, was testimonial because it "reveal[ed] his thought processes." Pet. App. B15; see *id.* at B14. The court relied particularly on its prior decision in *Commonwealth* v. *Conway*, *supra*, which noted that "confusion is arguably a sign of intoxication," and held that a defendant cannot be "forced to incriminate himself by 'communicating' his confusion while performing [sobriety] tests." 368 Pa. Super. at 498-499, 534 A.2d at 546.[9] But the fact that a suspect's confused thought processes communicate that he is drunk does not make his statements testimonial evidence. A statement or conduct is not "testimonial" simply because it can be said to reveal something about the workings of a person's mind. Slurred speech and the inability to walk a straight line or to read a few simple words all reveal something about the suspect's mental processes, but none of those demonstrations can be said to be testimonial. In order to be testimonial, "an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe* v. *United States*, 108 S. Ct. 2341, 2347 (1988). Respondent's inability to answer the "sixth birthday" question did not relate a factual assertion or disclose information to the government.[10] That evidence was therefore admissible at trial.

largely from the defendant's account of the crime during his interview, including the statements he made and the remarks he omitted in reciting the details of the crime. *Id.* at 464. The Fifth Amendment privilege—and thus the *Miranda* decision—were applicable, the Court held, "because the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination." *Id.* at 465. The Court noted that the lower court, which had reached the same conclusion, had "doubted the applicability of the Fifth Amendment" if the psychiatrist's diagnosis "had been founded only on respondent's mannerisms, facial expressions, attention span, or speech patterns." *Id.* at 464 n.8, citing *Smith* v. *Estelle*, 602 F.2d 694, 704 (5th Cir. 1979).

[9] In *Commonwealth* v. *Thompson*, 377 Pa. Super. 598, 547 A.2d 1223 (1988), the court went beyond the decision here and suppressed a videotape of a sobriety test that showed that "the subject was obscene and uncooperative." 377 Pa. Super. at 606, 547 A.2d at 1227. Relying, like the court below, on *Conway*, the court reasoned that "obscenity and belligerence are just as indicative of an individual's thought processes as is confusion," and concluded that the tape was testimonial evidence for that reason. *Ibid.*

3. *The Sobriety Tests*. It is clear that the officers at the Booking Center were not required to advise respondent of his *Miranda* rights and obtain a waiver of those rights before administering sobriety tests and asking respondent to take a breath test. A breath test is indistinguishable from a blood test for Fifth Amendment purposes. It is no more communicative or testimonial than the blood test involved in *Schmerber*; if anything, it is a less intrusive method of obtaining evidence. Because taking a breath test does not implicate the Self-Incrimination Clause, this Court has noted that a police inquiry whether the suspect will take such a test "is not an interrogation within the meaning of *Miranda*." *South Dakota* v. *Neville*, 459 U.S. at 564 n.15.

For the same reason, the court below recognized that "no *Miranda* warnings were required" before respondent was asked to perform the sobriety tests. Pet. App. B10. As the

[10] Of course, respondent's conduct cannot be deemed "testimonial" on the ground that it "disclose[d]" the "information" that he was confused. Schmerber's blood test "disclosed" the information that he was legally drunk, Gilbert's handwriting exemplar "disclosed" that he had distinctive handwriting, and Dionisio's voice exemplar "disclosed" that he had a distinctive voice, but none was deemed testimonial. The "information" in each of those cases, as in this one, was an inference drawn by the finder of fact from demonstrative evidence, similar to the inference that would be drawn from a videotape showing the suspect staggering around the police station.

court explained, "[r]equiring a driver to perform physical tests or to take a breath analysis test does not violate the privilege against self-incrimination because the evidence procured is of a physical nature rather than testimonial." *Id.* at B9 (quoting *Commonwealth* v. *Benson*, 280 Pa. Super. 20, 29, 421 A.2d 383, 387 (1980)). That is because "[f]ield sobriety tests • • • are not intended to reveal any thoughts or knowledge of the subject. • • • They only require him to exhibit his physical coordination, or lack thereof." *Commonwealth* v. *Brennan*, 386 Mass. 772, 779, 438 N.E.2d 60, 65 (1982).[11]

Nor does it matter that, to perform the sobriety tests, respondent had to cooperate with the police to some degree. In *Schmerber*, the Court noted that the lower courts had long held that suspects may be compelled "to assume a stance, to walk, or to make a particular gesture," 384 U.S. at 764, all of which require cooperation. This Court has held that suspects may be required to produce voice exemplars, *United States* v. *Dionisio*, 410 U.S. at 7, and handwriting exemplars, *Gilbert* v. *California*, 388 U.S. 263, 266 (1967). Both of those procedures require more cooperation than exhaling into a device that tests the blood alcohol level from the breath, and roughly the same degree of cooperation as the other sobriety tests that respondent performed.

The Commonwealth could, therefore, have compelled respondent to take the breath test or the other sobriety tests without obtaining a waiver of his *Miranda* rights; so, too, the Commonwealth could properly offer into evidence the results of those tests or the fact that respondent refused to

[11] Nor is there any difference, under the Fifth Amendment, between being asked to count to 30 while standing on one leg and performing sobriety tests like the horizontal gaze nystagmus test and the walk and turn test, which do not require the defendant to speak. As we have noted above, the fact that a defendant must speak does not make evidence testimonial.

take them. See *South Dakota* v. *Neville*, 459 U.S. at 563-564. If the results of the tests are admissible, there is no reason why the trier of fact should not be permitted to view a videotape of the defendant performing the tests and judge for itself whether the defendant appeared to be drunk.

4. *The Statements Made During the Sobriety Tests.* Finally, the statements respondent made while taking the sobriety tests and while being told about the provisions of Pennsylvania law should be admitted for two independent reasons. First, the administration of sobriety tests and the description of state law are not procedures "reasonably likely to elicit an incriminating response." *Rhode Island* v. *Innis*, 446 U.S. at 301; see also *South Dakota* v. *Neville*, 459 U.S. at 564 n.15. Although a suspect may volunteer something incriminating while performing the sobriety tests or being told about the law, nothing in either procedure is designed or likely to provoke such a response. The statements respondent made during the sobriety tests and the explanation of the implied consent law were thus not the products of custodial interrogation. *Palmer* v. *State*, 604 P.2d at 1109.

In this respect, the lower court was clearly in error. It failed to recognize that, for a statement to be within *Miranda*'s reach, it must be the product of questioning. Aside from the routine booking questions and the question regarding respondent's sixth birthday, discussed above, respondent was not questioned during the administration of the sobriety tests or the explanation of the requirements of Pennsylvania law.[12] It was respondent who volunteered information and

[12] The question whether respondent understood Pennsylvania law obviously did not constitute "custodial interrogation" for purposes of *Miranda*, since the question was asked simply to ensure that the terms of the law had been adequately explained to respondent, not to obtain an incriminating admission from him. See *South Dakota* v. *Neville*, 459 U.S. at 555 n.2, 564 n.15; *United States* v. *Emery*, 682 F.2d 493, 501 (5th Cir.), cert. denied, 459 U.S. 1044 (1982).

asked questions that he subsequently sought to exclude from evidence. *Miranda* simply does not reach such volunteered statements that are not the product of custodial police interrogation.

In any event, none of respondent's videotaped statements consisted of incriminating admissions.[13] The videotape was entered into evidence not to prove the truth of anything respondent said, either during booking or later, but because respondent's speech patterns and his difficulty in responding to the questions showed that he was drunk. The court below recognized that fact, as it concluded that respondent's videotaped responses were prejudicial in part because they "led the finder of fact to infer that [respondent's] • • • failure to speak clearly indicated a state of drunkenness that prohibited him from safely operating his vehicle." Pet. App. B17-B18. The fact that it did not matter what respondent said, but how he said it, proves that the audio portion of the tape is demonstrative evidence, not testimonial evidence.

There is no doubt that the police officers who booked respondent and administered the tests could testify that his manner of speech indicated that he was drunk. Because the videotape was offered for precisely the same reason, it should be equally admissible. If the police officers may testify about their observations of respondent's condition, as they surely may, the trier of fact should be allowed to see and hear a videotape of the suspect's actual performance at the time and reach its own conclusion as to his condition.[14] The Superior Court therefore should not have ordered that evidence excluded.

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[13] While he was on the side of the road, respondent told the police officer that he was too drunk to perform the field sobriety tests. Pet. App. B4. On the videotape, however, respondent "gave no incriminating statement." *Id.* at C6.

[14] In a case such as this, where the defendant speaks English as a second language, defense counsel might well contend that the booking officer misinterpreted the defendant's difficulty speaking and comprehending English for evidence that he was drunk. A trier of fact would best be able to resolve such a dispute by watching and listening to the videotape of the booking and testing procedures.

CONCLUSION

The judgment of the Superior Court of Pennsylvania should be reversed.

Respectfully submitted.

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